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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN AND VALERIE ZAHN, CHARLES LEAZER AND MARION L. LEAZER, individually on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CONSUMERS UNION OF UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME IN SUPPORT OF APPELLANT AND BRIEF OF CONSUMERS UNION OF UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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MOTION OF CONSUMERS UNION OF UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME IN SUPPORT OF APPELLANT

Consumers Union of United States, Inc. (hereinafter "Consumers Union") hereby respectfully moves this Court, in accordance with its Rule 42, for leave to file the attached brief amicus curiae in support of appellant in the above-captioned case. The consent of appellant has been obtained and filed with the Clerk of this Court. The consent of respondent was requested but denied.

Consumers Union, a non-profit corporation established in 1936 under the New York Membership Corporations Law, is the largest consumer organization in the world, with more than 375,000 members. Consumers Union publishes the magazine *Consumer Reports*, which has a paid circulation of more than 2.2 million, in which it evaluates consumer goods and services and disseminates information of general consumer interest to its readers. In addition, Consumers Union from time to time participates in judicial and administrative proceedings of concern to consumers. Last term, Consumers Union filed a brief amicus curiae in support of the Government's position in the five drug efficacy cases (*Weinberger v. Hynson, Westcott and Dunning, Inc.* and consolidated cases, Nos. 72-394, 72-414, 72-528, 72-555 and 72-666). Consumers Union has also filed briefs amicus curiae in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) and *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

Since its founding, Consumers Union has devoted considerable attention to the difficulties which consumers face in attempting to redress various types of consumer injuries. Consumers Union regards Rule 23 of the Federal Rules of Civil Procedure, with its provision for class actions, as an efficient and equitable procedural device to assure access to the federal judicial system for claims which, while too small to justify the expenses of individual litigation, are large enough to be consequential. The decision below, if left undisturbed, will substantially defeat the purpose of rule 23 without conferring any corresponding benefit on the federal judicial system.

Consumers Union seeks to file this brief amicus curiae in order to bring to this Court's attention important considerations of policy, including the effects on court

caseloads and the relationship of the federal and state judiciaries, which are at stake in this case and which none of the parties has adequately addressed.

Consumers Union recognizes that this brief amicus curiae is being filed out of time, and respectfully moves this Court to permit its filing for the following reasons. In June, 1973, shortly after this Court had recessed for the summer, the Consumer Federation of America notified Consumers Union, one of its members, that it had filed a brief amicus curiae in support of appellant's petition to this Court for certiorari, but that it could not afford to submit a brief amicus curiae on the merits of the instant case with this Court, as it had intended to do. The lateness of the submission will not prejudice the parties herein because oral argument has not yet been set. Consumers Union also respectfully urges that the late submission will not unduly inconvenience this Court because of its filing during the Court's summer recess.

Because the legal question presented is virtually a matter of first impression and its disposition will be of considerable moment to consumers, Consumers Union submits that the exploration of policy issues in its brief amicus curiae will assist the Court in its task of decision.

CONCLUSION

For the foregoing reasons, Consumers Union respectfully submits that its Motion for Leave to File Brief Amicus Curiae Out of Time in Support of Appellant should be granted.

Respectfully submitted,

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BRIEF OF CONSUMERS UNION OF UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of Consumers Union of United States, Inc., is described in its Motion for Leave to File Brief Amicus Curiae above.

ARGUMENT

ESTABLISHED PRECEDENT AND IMPORTANT CONSIDERATIONS OF PUBLIC POLICY REQUIRE RECOGNITION OF FEDERAL JURISDICTION OVER A CLASS ACTION IN WHICH ALL NAMED PLAINTIFFS SATISFY THE JURISDICTIONAL AMOUNT REQUIREMENT.

Consumers Union, amicus curiae herein, urges this honorable Court to reverse the decision below of the United States Court of Appeals for the Second Circuit, reported at 469 F.2d 1033, which affirmed the order of the United States District Court for the District of Vermont, reported at 53 F.R.D. 430, refusing to permit the action to proceed as a class action. Consumers Union contends that Circuit Judge Timbers' dissent below (Cert. Petn., pp. 22-31) demonstrates that applicable law and policy amply support the use of well-recognized principles of ancillary jurisdiction to allow appellants to proceed as representatives of a class.

Crucial considerations of public policy justify and require reversal of the Second Circuit's decision below. Affirmance would exacerbate, rather than ameliorate, the heavy burdens borne by the nation's courts, federal and state. Named plaintiffs such as those herein would continue to litigate in the federal forum, while all other class members would simply be forced to proceed in state courts, thus needlessly burdening those courts with expensive and duplicative litigation, and jeopardizing the "fair and efficient adjudication" embodied in Rule 23 of the Federal Rules of Civil Procedure.

According to Professor Benjamin Kaplan,[1] a member and, from 1960 to 1966, the Reporter of the Advisory

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[1] Then Professor of Law, Harvard University, now Associate Justice of the Supreme Judicial Court of Massachusetts.

Committee on Civil Rules, the extensive revisions of rule 23 in 1966 sought to make that rule more efficient and rational, in order to promote its dual purposes, namely (1) "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions," and (2) "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969). Reversal of the decision below would effectuate both purposes of revised rule 23 – economical use of judicial resources and facilitation of class actions in the federal courts – and is consistent with a well-established line of precedent.[2]

The Zahns and the Leazers, named plaintiffs herein, each alleged claims with values in excess of $10,000. The

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[2] The use of the concept of ancillary jurisdiction to expand the court's reach over an entire case is well-settled. *See, e.g., United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724-25 (1966) (related state claim may be heard with federal claim); *Moore v. New York Cotton Exchange*, 270 U.S. 593, 608-10 (1926) (state claim, asserted as compulsory counterclaim, cognizable in federal courts though federal claim dismissed on merits); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921) (if named plaintiffs satisfy diversity of citizenship requirements, claims of unnamed plaintiffs of non-diverse citizenship may be finally adjudicated).

Just as the federal courts may, under proper circumstances, assert ancillary jurisdiction over state claims of parties of non-diverse citizenship without violating Rule 82 of the Federal Rules of Civil Procedure, which proscribes construction of the rules to extend federal jurisdiction, so too may the courts assert ancillary jurisdiction over unnamed plaintiffs in a class action who do not satisfy the $10,000 jurisdictional amount requirement of 28 U.S.C. 1332(a).

sole question before this Court is whether named plaintiffs, all of whom are fully entitled to invoke the jurisdiction of a federal court, may at the same time represent a class, some members of which could not themselves invoke such jurisdiction. Accordingly, *Snyder v. Harris*, 394 U.S. 332 (1969), which held merely that a class of plaintiffs, none of whom could individually invoke federal jurisdiction, may not aggregate claims in order to reach the $10,000 jurisdictional amount, is not controlling. Nor is the instant case governed by *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), for the reasons expressed in Part III of Judge Timbers' dissenting opinion below (Cert. Petn., pp. 27-31), and in appellant's brief before this Court (pp. 13-18). Indeed, this is a case of first impression.

This brief will not further discuss the legal precedents herein. They have been presented fully and persuasively by Judge Timbers below and by appellants. Rather, amicus curiae Consumers Union will analyze the critical policy issues involved, for they have received less attention in the presentations to this Court than their importance merits and are of great concern to the members of Consumers Union.

A. The Decision Below, By Refusing to Invoke Ancillary Jurisdiction to Embrace All Class Members' Claims, Fosters Duplicative Litigation without Alleviating the Federal Court Caseload.

Allowing the federal courts to assert jurisdiction over a class whose representatives all allege $10,000 in controversy will neither increase the federal caseload nor overburden the courts. To the contrary, "it makes good sense

in terms of economy and consistency to dispose of . . . additional claims in a single lawsuit," Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 51 (1967). If the *Zahn* class is not allowed to proceed, duplicate litigation will almost certainly result, imposing on the courts and the parties the burdens of multiple expenditures of time and money, with no offsetting benefits. Regardless of whether the class is certified or not, a federal court will undoubtedly decide the substantive issues in *Zahn*. Given that certainty, fostering duplicative litigation can serve no purpose and flatly contradicts the very policy which the court below asserted in justification of its result (Cert. Petn., pp. 20-21), namely, the need to ease the burdens on courts.[3]

The majority below, in assessing the effect of reversal on federal court caseloads, failed to consider the inevitable petitions to this Court for certiorari from state court decisions in cases duplicating federal adjudications at the behest of persons who, but for their lack of $10,000 in controversy, would have been members of a class represented in an existing federal court action. In cases such as *Zahn*, where federal jurisdiction is based upon diversity of citizenship, the plaintiffs refused admittance to the federal action would be strongly motivated to seek legitimate grounds for review in this Court of a state determination. Should federal

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[3] Of course, determination of damages will require a plaintiff-by-plaintiff assessment, but only in those cases in which liability is sustained. Furthermore, the use of such innovative techniques as the appointment of a special master to assist in assessing damages, as was done, for example, in *Biechele v. Norfolk & W. Ry. Co.*, 309 F. Supp. 354, 358-59 (N.D. Ohio 1969), an environmental pollution case like *Zahn*, could streamline this facet of class litigation while retaining the advantages of efficiency which rule 23 was designed to encourage.

and state courts enter different judgments in cases arising out of the same factual or legal relationship, the losing party in the state court will be especially likely to seek review on the basis of any aspect of court procedure – such as selection of jurors or admission of evidence – upon which the two courts disagreed. And potential class members in federal question litigation who have been remitted to the state courts for failure to satisfy the federal jurisdictional amount requirement will have considerable ammunition for appeal if and when state and federal actions by plaintiffs who differ only in the size of their claims result in contrary judgments.

Additionally, this Court should take a broader view of burdens on the national judiciary than did the court below. Reversal of the decision below might marginally increase the work of the federal courts in handling existing cases by requiring the assessment of damages of class members (but only, of course, if liability is found). Affirmance, however, would add numerous new cases to the dockets of the state courts. To swell state court dockets in order to protect the federal courts from such minor burdens would constitute an illogical and inefficient deployment of scarce judicial resources. To save one federal dollar while imposing two or more dollars in costs upon a state court to replay entire adjudications is neither a bargain for the taxpayer nor a method of insuring maximum justice within budgetary constraints. *See* 41 CIN. L. REV. 968, 974 (1972).

Reversal of the decision below would not automatically allow this case and all similar cases to proceed as class actions. The trial court always retains the discretion granted by Rule 23(b)(3) to decide whether or not "a class action is superior to other available methods for the fair

and efficient adjudication of the controversy."[4] One of the relevant inquiries under this rule is whether a class action would in fact economize on expenditures of scarce judicial resources. If no economy would result, the court may deny certification of the class. If judicial economy would be fostered, on the other hand, the court should be allowed to exercise its ancillary jurisdiction over all unnamed plaintiffs, regardless of the value of their claims, where all named plaintiffs have properly invoked federal jurisdiction.

B. Federal-State Comity Requires Exercise of Ancillary Jurisdiction to Reach All Class Members' Claims.

Unless the decision below is reversed to allow exercise of ancillary jurisdiction over all class members' claims, the federal and state courts will experience unnecessary and mischievous conflicts.[5]

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[4] The question of proper exercise of discretion is not before the Court in the instant case. In his order denying certification of the class, Chief Judge Leddy clearly indicated that his opinion was not based on the exercise of discretion ("We reach our decision today with great reluctance," Cert. Petn., p. 46), but on the belief that "*Snyder [Snyder v. Harris, supra]* precludes our obtaining jurisdiction over those members of the proposed class who do not meet the $10,000 jurisdictional requirement" (Cert. Petn., p. 43). *See* 7 GA. L. REV. 390, 399 (1973).

[5] Affirmance, it should be reiterated, would not decrease the number of instances in which federal courts render decisions on matters of state law. Plaintiffs in diversity cases, such as the Zahns and the Leazers, who meet the jurisdictional amount requirement, may proceed individually in the federal courts. The only way to eliminate

(continued)

Two types of unseemly conflicts will inevitably occur unless the decision below is reversed. One potential conflict is substantive disagreement on questions of state law in the context of indistinguishable factual situations if state and federal courts are obliged by the decision below to conduct separate adjudications on matters affecting similarly situated plaintiffs. Such conflicts will appear unjust to the litigants and will confuse the bench, the bar, and the public who rely upon precedent as a guide to decision-making.

Amicus of course recognizes that, in diversity cases, the federal courts must apply state law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). But frequently matters will arise upon which there either has been no definitive state interpretation or state precedent is very old and probably would be modified upon contemporary reconsideration. In such situations, the federal courts apply the law as they think it would be applied by the highest state court; the state courts are free to disagree with federal interpretation and often do.

The second type of potential conflict is more subtle but equally destructive of confidence in the fairness of the judiciary. When two or more[6] courts must rule separately

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[5] (continued)
such conflicts from the judicial system would be to abolish federal diversity jurisdiction.

Note too that federal courts which hear related state claims under their pendent jurisdiction powers are making much more significant inroads on state prerogatives. *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 724-25.

[6] In the instant case and others like it, the unnamed plaintiffs denied participation in federal court may satisfy jurisdiction and venue requirements of more than one state court; several state actions could follow dismissal of the federal class proceeding.

upon issues arising out of one incident, the decision of the first court to rule[7] is likely to exert some influence upon the later rulings. This subtle element in decision making was recently recognized by a federal court in an opinion concerning three class actions which arose out of an airplane collision. An adjudication which goes against a plaintiff, the court noted, is "as a practical matter" dispositive of the rights of others with identical claims who are not parties thereto only because a class proceeding was disallowed. *Petition of Gabel*, 350 F. Supp. 624, 630 (C.D. Cal. 1972).

The two aforementioned conflicts, like Scylla and Charybdis, will be impossible to avoid, unless this Court reverses the decision below. If a state court denies relief that a federal court earlier granted to similarly-situated plaintiffs, there will be conflicting legal precedents and justice will appear erratic. If a state court reaches the same result as an earlier federal case, the parties will rightfully wonder at the extent of the federal influence over the state decision. Neither situation should be tolerated, particularly when no public interest is served thereby.

C. The Decision Below Threatens Continued Viability of Rule 23(b)(3) Class Actions Where Jurisdictional Amount is Required.

Unless this Court reverses the decision below, rule 23 (b)(3) will be limited entirely to those federal question

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[7] The first court to rule is assumed to be the federal court because state court litigation, in cases like the case at bench, would not be initiated until an adverse ruling by the federal court precludes jurisdiction over the class. Sometimes, of course, a later-commenced proceeding might be the first concluded.

cases for which no jurisdictional amount is required. It is simply not credible that the authors of rule 23 intended that section to have such limited applicability.

As Chief Judge Leddy explained (Cert Petn., p. 46), the decision below "clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable [footnote omitted]." In few cases will all conceivable class members have claims exceeding $10,000; any class is likely to include at least one potential plaintiff with minimal damages. Insoluble questions arise: at what point does a trial court assume that all unnamed plaintiffs can substantiate their allegations of $10,000 in damages? Need the unnamed class members be identified and asked to present preliminary proof of damages prior to the decision on jurisdiction? The decision below will certainly encourage defendants in all class actions where $10,000 in controversy is a prerequisite to federal jurisdiction to allege that one or more unnamed class members do not satisfy this requirement. Such allegations will become boilerplate in class actions and will confront the trial court with Hobson's choice – either try the issue of damages prior to the trial on liability, or dispense with (b)(3) class actions altogether whenever jurisdictional amount is requisite. The absurdity of either result – and the complete absence of any countervailing benefit in terms of judicial resources from dismissal of such class actions – underlines the necessity of reversal.

THE INSTANT CASE SATISFIES THE JURISDICTIONAL AMOUNT REQUIREMENT BECAUSE DEFENDANT'S STAKE IN ITS OUTCOME IS WORTH MORE THAN $10,000.

This Court should consider the "matter in controversy" requirement from the point of view of the defendant, as well as from that of the plaintiffs. Defendant's stake in the instant litigation is worth significantly more than $10,000, and therefore the jurisdictional amount requirement is satisfied.

This Court has never decided in which of three possible ways the jurisdictional amount requirement should be viewed: in terms of the plaintiff's stake in the outcome of the litigation, in terms of the defendant's stake, or in terms of the stake of either plaintiff or defendant, in the alternative. A minority of courts, taking the latter course, have sustained jurisdiction when the defendant's potential loss exceeded $10,000, although the plaintiff's did not. *See* 1 MOORE'S FEDERAL PRACTICE, Para. 0.91[1]; C. WRIGHT, FEDERAL COURTS, §34 (2d ed. 1970); and cases cited therein. Since all cases affected by the decision below involve, by definition, controversies where significantly more than $10,000 is at stake, this approach to the matter in controversy requirement comports with its rationale, namely to prevent the federal courts from "fritter[ing] away their time in the trial of petty controversies." Wright, *Class Actions*, 47 F.R.D. 169, 183 (1969), citing WRIGHT, FEDERAL COURTS, *supra*, §32. Amicus curiae contends that such a "modified 'defendant-viewpoint' [footnote omitted]," Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1576, 1592 (1970), is appropriate to apply in all class action cases, and would produce results more consistent with the policies

underlying rule 23 than does the conventional "plaintiff-viewpoint." *See generally id.*

FURTHER CONSIDERATIONS PARTICULARLY PERTINENT TO CONSUMER LITIGATION REQUIRE REVERSAL IN THE INSTANT CASE.

But for the class action device, few persons could afford to seek judicial redress of any but the most grievous harm, regardless of the merits of their position. Typically in consumer litigation, a large number of plaintiffs asserts small individual losses caused by the action of a defendant. When there is already a plaintiff "entitled to open the door," Frankel, *supra*, 43 F.R.D. at 51, with a legitimate allegation of a $10,000 claim, the federal courts should exercise the ancillary jurisdiction that they assert in exactly analogous situations (see note 2, *supra*) in order to adjudicate the claims of all members of a class without regard to their size.[8]

It is bitterly ironic that the certification of class actions, which in theory saves time and money for all litigants, is desperately fought by defendants. But it is all too well recognized that, unless the class proceeds, most potential claimants will simply chalk up their losses to experience because they cannot individually afford access to the courts.

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[8] It is inadequate to suggest, as does respondent (Resp. Br., p. 22), that plaintiffs with small claims are adequately protected by state class action procedures. Although most states recognize some type of class action remedy, the procedures are frequently so much more restrictive than those of Federal Rule 23 as to render class remedies nugatory. *See, e.g.*, New York CPLR §1005; *Hall v. Coburn Corporation of America*, 26 N.Y. 2d 396, 311 N.Y.S. 2d 281, 259 N.E. 2d 720 (1970).

Many cities and states are now actively pursuing judicial remedies for harms they suffered as major purchasers of consumer goods. *E.g., In re Antibiotic Antitrust Actions*, 333 F. Supp. 267-324 (1971); Pomerantz, *New Developments in Class Actions – Has Their Death Knell Been Sounded?* 25 BUS. LAWYER, 1259, 1259-60 (1970). Frequently, more than $10,000 is in controversy, as, for example, when a city or county sues to recover money expended for drugs found ineffective by the Food and Drug Administration, but which had nevertheless been purchased for and dispensed at public hospitals for years. *See Consumer Federation of America v. Wyeth Laboratories*, No. 2198-71, *Consumer Federation of America v. Eli Lilly and Company*, No. 304-72, *Consumer Federation of America v. Upjohn Company*, No. 306-72, U.S. District Court for the District of Columbia (decided October 19, 1972), *see* Appendix to Amicus Curiae Brief submitted herein in support of appellant's petition for certiorari by the National Council of Senior Citizens and the Consumer Federation of America. Amicus curiae Consumers Union contends that neither legal precedent nor public policy warrants the refusal of the federal judiciary, having a case legitimately before it brought by plaintiffs who allege $10,000 claims, to adjudicate at the same time citizens' smaller claims for the identical injury.

The decision below has been subjected to a rare unanimity of disapproval by commentators. Indeed, the view of appellant and Consumers Union that this Court should reverse that decision has been supported, generally with enthusiasm, in all the scholarly commentary directed to the *Zahn* opinions.[9] The central conclusion of this large

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[9] *See* G. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum – A Post Snyder v. Harris Analysis*, 22 (continued)

body of critics is that the decision below will neither significantly increase nor reduce the federal court caseload, but rather will lead to multiple adjudications, thereby defeating considerations of judicial economy. Note, *Developments in the Law of Federal Class Action Litigation – Catch 22 in Rule 23*, 10 HOUSTON L. REV. 337, 369 (1973); 14 B. C. IND. & COM. L. REV. 543, 553 (1973); 61 GEO. L. J. 1327, 1336 (1973); 9 HOUSTON L. REV. 852, 857-58 (1972); 47 ST. JOHN'S L. REV. 339 (1972). Many commentators have added that, if the decision below is allowed to stand, the usefulness of the rule 23(b)(3) class action as a procedural reform will be almost entirely vitiated. 14 B. C. IND. & COM. L. REV., *supra* at 554; 22 CLEV. STAT. L. REV. 204, 215 (1973); 73 COLUM. L. REV. 359, 370-71 (1973); 61 GEO. L. J., *supra* at 1337; 26 VAND. L. REV. 375, 381 (1973).

In the instant case, the named plaintiffs are entitled to invoke federal jurisdiction regardless of this Court's decision on the certification of the class. "Law is common sense," *Johns-Manville Sales Corp. v. Chicago Title and Trust Co.*, 261 F. Supp. 905, 908 (N.D. Ill. 1966), and common sense, as well as considerations of judicial economy, comity, and avoidance of inequity, demands that all potential claims from defendant's alleged pollution of Lake Champlain be litigated together.

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[9] (continued)
AM. U.L. REV. 79, 98 (1972); *Developments in the Law of Federal Class Action Litigation – Catch 22 in Rule 23*, 10 HOUSTON L. REV. 337, 368-71 (1973); 14 B.C. IND. & COM. L. REV. 543 (1973); 22 CLEV. STAT. L. REV. 204 (1973); 73 COLUM. L. REV. 359 (1973); 41 FORDHAM L. REV. 991 (1973); 7 GA. L. REV. 390, *supra*; 61 GEO. L. J. 1327 (1973); 26 VAND. L. REV. 375 (1973); 9 HOUSTON L. REV. 852 (1972); 47 ST. JOHN'S L. REV. 339 (1972).

CONCLUSION

For the foregoing reasons and those cited by appellant in its brief and by Judge Timbers in his dissenting opinion below, amicus curiae Consumers Union respectfully urges that this Court reverse the decision below.

Respectfully submitted,

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